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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OMAR ZINE, individually, and on behalf of
 other members of the general public similarly
 situated,

Plaintiff,

vs.

NESPRESSO USA, INC., a Delaware
 corporation; and DOES 1 through 10, inclusive,

Defendants.

WILLIAM BABER, an individual, on behalf of
 himself and all others similarly situated and
 aggrieved,

Plaintiff,

vs.

NESPRESSO USA, INC., a Delaware
 corporation; NESTLE USA, INC., a Delaware
 corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 3:20-cv-05144-SK
 Consolidated with 3:21-cv-00487-JSC

Assigned to the Hon. Sallie Kim

**NOTICE OF MOTION AND MOTION FOR
 FINAL APPROVAL OF CLASS ACTION
 AND PAGA SETTLEMENT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: May 8, 2023
 Time: 9:30 a.m.
 Place: Courtroom C

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 8, 2023 at 9:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom C of the above-captioned court, located at 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Sallie Kim presiding, Plaintiffs Omar Zine and William Baber will, and hereby do, move this Court for entry of an order and judgment granting final approval of the class action settlement and all agreed-upon terms therein. This Motion, unopposed by Defendant Nespresso USA, Inc., seeks final approval of: (1) the Joint Stipulation of Class Action and PAGA Settlement and Release, (2) settlement payments to Participating Class Members and the LWDA, and (3) costs/expenses to the settlement administrator, CPT Group, Inc.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement; (3) the previously filed Motion for Attorneys' Fees, Costs and Expenses, and Class Representative Enhancement Payments and supporting declarations; (4) the Declaration of Raul Perez; (5) the Declaration of Cheryl A. Kenner; (6) the Declaration of Irvin Garcia on behalf of CPT Group, Inc.; (7) the [Proposed] Order Granting Final Approval of Class Action and PAGA Settlement; (8) the [Proposed] Judgment; (9) the records, pleadings, and papers filed in this action; and (10) upon such other documentary and/or oral evidence as may be presented to the Court at the hearing.

Dated: April 4, 2023

Respectfully submitted,

By: /s/ Raul Perez

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 12, 2022, this Court granted preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement and Release¹ and approved distribution of the Notice of Class Action Settlement to all Class Members. Class Members were given 45 days to opt out or object to the Settlement (“Response Deadline”). Now that the Response Deadline has passed, Plaintiffs Omar Zine and William Baber are pleased to report that: (1) no Class Members opted out; (2) no Class Members have objected to the Settlement; (3) the **entire Net Settlement Fund will be disbursed to all Participating Class Members**; (4) the average payment to Participating Class Members from the Net Settlement Fund is \$837.67, and the highest is \$3,257.40. (Declaration of Irvin Garcia [“Garcia Decl.”] ¶¶ 6-9.)

Plaintiffs now move for final approval of the class action settlement. This motion is unopposed by Defendant Nespresso USA, Inc. (collectively with Plaintiffs, the “Parties”). The principal terms of the Settlement provide for the following:

- (1) Conditional certification of a Settlement Class defined as: All persons employed in California by Defendant as non-exempt employees at any time during the period from June 3, 2016 through January 4, 2022 (“Class Members”).
- (2) A **non-reversionary** Gross Settlement Amount of \$950,000. The Gross Settlement Amount includes:
 - (a) A Net Settlement Fund (the Gross Settlement Amount minus the requested Attorneys’ Fees and Costs, Settlement Administration Costs, the \$80,000 PAGA settlement, and the Class Representative Enhancement Payments), which will be allocated to all Class Members on a pro-rata basis according to the number of weeks each Class Member worked during the Class Period. **The Entire Net Settlement Fund will be paid to all Class Members who did not opt out of the Settlement Class.**

¹ Hereinafter, the “Settlement” or “Settlement Agreement.” Unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Settlement.

- (b) Attorneys’ fees in the amount of one-third of the Gross Settlement Amount (or \$316,667), and litigation costs and expenses of \$24,085.88, to Capstone Law APC and Shegerian & Associates, Inc. (“Plaintiffs’ Counsel”).
- (c) Settlement administration costs of \$10,000, to be paid to the jointly selected Settlement Administrator, CPT Group, Inc. (“CPT”).
- (d) A \$80,000 PAGA settlement, of which 75% (\$60,000) will be paid to the Labor & Workforce Development Agency (“LWDA”), and the remaining 25% (\$20,000) (“PAGA Fund”), will be payable to PAGA Members, defined as: All persons employed in California by Defendant as non-exempt employees at any time during the period from March 6, 2019 through January 4, 2022. **The Entire PAGA Fund will be paid to all PAGA Members.**
- (e) Class Representative Enhancement Payments of \$5,000, each, to Omar Zine and William Baber for their service on behalf of the Settlement Class, and General Release Payments of \$5,000, each, for general releases of all claims arising out of their employment with Defendant.

An objective evaluation of the Settlement confirms that the relief negotiated on the Settlement Class’s behalf is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at arm’s length with helpful guidance from Jeffrey Krivis, Esq., an experienced and respected mediator of wage and hour actions, and the Settlement confers substantial benefits to Class Members. This relief—averaging \$837.67 per Class Member from the Net Settlement Fund—is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases. Moreover, by settling now rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial, or of Plaintiffs prevailing at trial but losing on appeal.

Accordingly, given the Settlement’s favorable terms, the Court’s previous findings concerning the Settlement’s fairness and reasonableness, and the complete absence of objection to the Settlement, Plaintiffs respectfully request that the Court: (1) grant this Motion for Final Approval of the Settlement Agreement; (2) grant final approval of the settlement administration costs/expenses; (3) enter judgment

pursuant to the Settlement Agreement; and (4) retain jurisdiction to enforce the Settlement.

II. FACTS AND PROCEDURE

A. Brief Overview of the Litigation

Nespresso is a Delaware corporation that produces and distributes some of the world's most well-known food brands, including Nescafe, Gerber, and Carnation. Nespresso operates at least nine retail locations in California in which it sells its coffee makers and related merchandise.

Plaintiff Zine worked for Nespresso in California as an hourly paid, non-exempt Specialist Boutique Coffee from approximately December 2015 to February 2019. (*See* Dkt. No. 24, Second Amended Complaint ["SAC"] ¶ 4.) His primary job duties included performing product demonstrations, providing customer service, opening and closing the store, and stocking merchandise. (*Id.*)

Plaintiff Baber worked for Nespresso in California as an hourly-paid, non-exempt retail sales specialist from approximately August 20, 2017 through approximately January 31, 2020. (Declaration of Cheryl A. Kenner ["Kenner Decl."] ¶ 3.) His job duties included stocking merchandise; selling merchandise; inventorying, organizing, packing and unpacking merchandise; cashiering; answering phones; assisting customers; janitorial tasks for the store and restrooms; providing food and drinks to customers; washing dishes; setting up deliveries of merchandise to customers; fulfilling orders to be shipped to customers who placed orders online or else picked up in-store; and performing general opening/closing duties.

On June 25, 2020, Plaintiff Zine filed his class action complaint against Nespresso in Contra Costa County (Case No. C20-01185). (Declaration of Raul Perez ["Perez Decl."] ¶ 2.) On July 27, 2020, Defendant removed this case to the Northern District of California. (*Id.*) Plaintiff Zine's operative SAC alleges that Defendant failed to pay overtime, minimum wages, provide compliant meal periods and rest periods, provide compliant wage statements, provide timely wages upon termination, failure to pay vested vacation time and paid time off upon termination, and unreimbursed business expenses. (*Id.*)

On June 3, 2020, Plaintiff William Baber filed his own class action and PAGA Representative action complaint alleging the same or substantially overlapping causes of action with a similar class definition as the Zine case. (Kenner Decl. ¶ 4.) On September 15, 2020, Plaintiff Baber filed his First Amended Complaint. (*Id.*) On January 7, 2021, Plaintiff Baber transferred his case from the Central

District of California to consolidate it with Plaintiff Zine's action. (*Id.* at ¶ 5.)

B. The Parties Settled at Mediation.

On October 4, 2021, the Parties participated in a mediation with Jeffrey Krivis, Esq., an experienced mediator of wage and hour class actions. (Perez Decl. ¶ 3.) Mr. Krivis helped to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*Id.*) With Mr. Krivis's guidance, the Parties were eventually able to negotiate a complete settlement of Plaintiffs' claims. (*Id.*) The terms of the settlement are now set forth in complete and final form in the Joint Stipulation of Class Action and PAGA Settlement and Release. (*Id.*) At all times, the Parties' negotiations were adversarial and non-collusive. (*Id.*) The Settlement therefore constitutes a fair, adequate, and reasonable compromise of the claims at issue. (*Id.*)

C. Plaintiffs' Counsel Conducted a Thorough Investigation of the Factual and Legal Issues and Were Thus Able to Objectively Assess the Settlement's Reasonableness.

Plaintiffs' Counsel's evaluation of the settlement's reasonableness was informed by their thorough investigation into Plaintiffs' claims and Defendant's defenses, and their review of the considerable discovery produced by Defendant during the matter's pendency. (Perez Decl. ¶ 4; Kenner Decl. ¶ 10.)

Prior to filing their respective actions, Plaintiffs contacted Plaintiffs' Counsel to discuss the factual bases for pursuing their actions against Defendant for Labor Code violations. (Perez Decl. ¶ 5; Kenner Decl. ¶ 10.) Plaintiffs were intimately familiar with Defendant's labor policies and practices, and over the course of multiple interviews, knowledgeably summarized those policies and practices to Plaintiffs' Counsel. (Perez Decl. ¶ 5; Kenner Decl. ¶ 6.) During those conversations, they explained how the policies and practices were instituted and provided valuable insight into how they gave rise to the alleged Labor Code violations. (Perez Decl. ¶ 5; Kenner Decl. ¶ 6.) Based on these interviews with Plaintiffs, Plaintiffs' Counsel determined that there were legally sufficient grounds for pursuing an action against Defendant. (Perez Decl. ¶ 5; Kenner Decl. ¶¶ 6–7, 10.)

In preparation for drafting the Complaints, Plaintiffs' Counsel conducted their own preliminary investigation into the factual bases for Plaintiffs' claims, which entailed, *inter alia*, a careful examination of Plaintiffs' personnel files and associated records. (Perez Decl. ¶ 6; Kenner Decl. ¶ 10.) Following the

1 filing of Plaintiffs' respective actions, and in response to their formal and informal discovery requests,
2 Plaintiffs' Counsel received a considerable amount of documents and data, including employee
3 demographic data, putative class members' contact information, a sample of time and pay records, and
4 Defendant's labor policies and procedures manuals which covered a broad range of topics including,
5 *inter alia*, employee clock-in policies and procedures, attendance policies, meal periods/rest periods,
6 overtime & premium pay, etc. (Perez Decl. ¶ 6; Kenner Decl. ¶ 11.) The document and data exchanges
7 allowed Plaintiffs' Counsel to fully assess the nature and magnitude of the claims being settled, as well
8 as the impediments to recovery, and ultimately enabled Plaintiffs' Counsel so as to make an independent
9 assessment of the reasonableness of the settlement's terms. (Perez Decl. ¶ 6; Kenner Decl. ¶ 12.)

10 Following the production of the Class Members' contact information, Plaintiffs' Counsel also
11 interviewed numerous Class Members to determine the extent and frequency of the alleged Labor Code
12 violations and to learn more about the day-to-day circumstances giving rise to the alleged violations.
13 (Perez Decl. ¶ 7; Kenner Decl. ¶ 13.) These Class Members worked in both stand-alone Nespresso
14 boutiques, and Bloomingdales locations during the entire class period from 2017 through 2021. (Perez
15 Decl. ¶ 7; Kenner Decl. ¶ 13.) Geographically, these Class Members worked in all relevant regions; i.e.,
16 Northern and Southern California. (Perez Decl. ¶ 7; Kenner Decl. ¶ 13.) The Class Members interviewed
17 held the following positions: greeter, sales associate, coffee specialist, barista, boutique specialist,
18 manager in-training, in-house trainer, team lead, shift lead, assistant manager, and chef. (Perez Decl. ¶ 7;
19 Kenner Decl. ¶ 13.)

20 In summary, Plaintiffs' Counsel performed a thorough investigation into the claims at issue,
21 which included: (1) determining Plaintiffs' suitability as private attorneys general and class
22 representatives through interviews, background investigations, and analyses of their employment files
23 and related records; (2) evaluating all of Plaintiffs' potential representative claims; (3) researching similar
24 wage and hour class actions as to the claims brought, the nature of the positions, and the type of
25 employer; (4) analyzing a sample of employees' time and wage records; (5) reviewing Defendant's labor
26 policies and procedures manuals; (6) interviewing Class Members; (7) researching settlements in similar
27 cases; (8) evaluating Plaintiffs' claims and estimating Defendant's liability for purposes of settlement;
28 (9) drafting the mediation brief; and (10) participating in the mediation. (Perez Decl. ¶ 8; Kenner Decl. ¶

10.)

By engaging in such a thorough investigation and evaluation of Plaintiffs' claims, Plaintiffs' Counsel can opine that the Settlement, for the consideration and on the terms set forth in the Settlement Agreement, is fair, reasonable, and adequate, and is in the best interests of Class Members in light of all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation, and various defenses asserted by Defendant. (Perez Decl. ¶ 9; Kenner Decl. ¶ 14.)

D. The Proposed Settlement Fully Resolves Plaintiffs' Claims.

1. Composition of the Settlement Class

The proposed Settlement Class consists of all persons employed in California by Defendant as non-exempt employees at any time during the period from June 3, 2016 through January 4, 2022. (Settlement Agreement ¶ 5.)

2. Settlement Consideration

Plaintiffs and Defendant have agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of \$950,000. The Gross Settlement Amount includes: (1) automatic payments to all Participating Class Members—meaning, all Class Members except those who submit timely and valid Requests for Exclusion—from the Net Settlement Fund; (2) \$316,667 in attorneys' fees (i.e., one-third of the common fund) and \$24,085.88 in litigation costs to Plaintiffs' Counsel; (3) Settlement Administration Costs of \$10,000; (4) a \$60,000 payment to the LWDA and a \$20,000 payment to PAGA Members; and (5) Class Representative Enhancement Payments of \$5,000, each, for Plaintiffs' service on behalf of the Settlement Class, and General Release Payments of \$5,000, each, for general releases of all claims arising out of their employment with Defendant. (Settlement Agreement ¶¶ 34-39.)

Subject to the Court approving Attorneys' Fees and Costs, Settlement Administration Costs, the payment to the LWDA, and the Class Representative Enhancement Payments, the Net Settlement Fund will be distributed to Participating Class Members in full. (Settlement Agreement ¶ 40.)

3. Formula for Calculating Payments from the Net Settlement Fund

Each Class Member's share of the Net Settlement Fund will be proportional to the number of weeks he or she worked during the Class Period. (Settlement Agreement ¶ 42.)

4. Formula for Calculating Payments from the PAGA Fund

Each PAGA Member's share of the PAGA Fund will be proportional to the number of weeks he or she worked during the PAGA Period. (Settlement Agreement ¶ 42(b).)

5. Releases by Class Members and PAGA Members

In exchange for the Gross Settlement Amount, Plaintiffs and Participating Class Members will agree to release the Released Class Claims during the Class Period:

All claims asserted in the Actions, reasonably arising from or related to the facts and claims alleged in the Actions, or that reasonably could have been raised in the Actions based on the facts and claims alleged in the operative civil complaints for each Action and all amendments thereto, including all claims for unpaid wages, minimum wage, overtime compensation, double-time compensation, and interest; the calculation of the regular rate of pay for overtime or for any purpose; meal period and rest-period premiums, including failure to pay premiums at the regular rate of compensation; reimbursement for all necessary business expenses; payment for all time spent in connection with security checks and all hours worked, including off-the-clock and unrecorded work; failure to pay vacation and paid time off upon termination; failure to provide accurate and timely wage statements; unfair business practices; penalties, including, but not be limited to, civil penalties, statutory penalties, recordkeeping penalties, and waiting-time penalties; and attorneys' fees and costs; all claims related to the Released Claims arising under: the California Labor Code (including, but not limited to, sections 200, 201, 202, 203, 204, 210, 218.5, 226, 226.3, 226.7, 227.3, 500, 510, 512, 516, 558, 558.1, 1174, 1174.5, 1182.12, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, and 2802), the Wage Orders of the California Industrial Welfare Commission; California Business and Professions Code section 17200, et seq. This release excludes the release of claims not permitted by law.

(Settlement Agreement ¶¶ 26, 55.)

And in exchange for the PAGA Settlement Amount, Plaintiffs and PAGA Members will agree to release the Released PAGA Claims during the PAGA Period:

All claims asserted through California Labor Code §§ 2698, et seq., that reasonably arise out of, or are related to, the Released Class Claims during the PAGA Period.

(Settlement Agreement ¶¶ 27, 56.)

E. The Notice and Settlement Administration Processes Were Completed Pursuant to the Court's Order.

As authorized by the Court's Order preliminarily approving the Settlement Agreement, the Parties engaged CPT to provide settlement administration services. (Garcia Decl. ¶ 2.) CPT's duties have, and if the Court enters the final approval order, will include: (1) printing and mailing the Notice of

Class Action Settlement (“Notice”); (2) receiving and processing undeliverable Notices and locating updated addresses for Class Members; (3) receiving and validating Requests for Exclusion; (4) calculating and distributing the Class Settlement Amount; (5) tax reporting; (6) providing necessary reports and declarations; and (7) performing such other tasks as set forth in the Settlement Agreement or as the Parties mutually agree or that the Court orders. (*Id.*)

On December 12, 2022, CPT received the Class Notice prepared jointly by Plaintiffs’ Counsel and counsel for Defendant and approved by the Court. (Garcia Decl. ¶ 3.) The Class Notice summarized the Settlement’s principal terms, provided Class Members with an estimate of how much they would be paid if the Settlement received final approval, and advised Class Members about how to opt out of the Settlement and how to object. (*Id.*)

Separately, counsel for Defendant provided CPT with a mailing list (the “Class List”), which included each Class Member’s full name, last known address, Social Security Numbers, and information necessary to calculate payments. (Garcia Decl. ¶ 3.) The mailing addresses contained in the Class List were processed and updated using the National Change of Address Database maintained by the U.S. Postal Service. (*Id.* at ¶ 4.) On January 23, 2023, CPT mailed Class Notices to Class Members via First-Class U.S. mail. (*Id.*) Class Members were given 45 days to opt out or object to the Settlement. Plaintiffs can now report that no Class Members opted out, and no Class Members have objected to the Settlement. (*Id.* at ¶¶ 6-7.)

III. ARGUMENT

A. Class Certification Requirements Are Met.

The Court certified the Class for settlement purposes upon Preliminary Approval, finding that requirements under Rule 23(a) and Rule 23(b)(2) were satisfied. (*See* Dkt. No. 60.) Nothing has changed that would affect the Court’s ruling on class certification. *See Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016) (reconfirming the certification set forth in the preliminary approval order “[b]ecause the circumstances have not changed” since that order); *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc) (courts must apply the criteria for class certification “differently in litigation classes and settlement classes”). Therefore, the Court should grant final certification of the Settlement Class.

B. The Court Should Grant Final Approval of the Class Settlement.

Upon final approval, the Court’s duty is to determine whether the proposed Settlement is “fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In evaluating the Settlement, the Court is guided by several important policies. First, federal courts favor settlements, particularly in class actions, where the costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong policy that favors settlements, particularly where complex class action litigation is concerned”). Second, for settlements reached through arms’-length negotiations, courts are to give:

[P]roper deference to the private consensual decision of the parties. . . . [T]he court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Hanlon, 150 F.3d at 1027.

Guided by these policies, the district court then may consider some or all of the following factors in evaluating the reasonableness of a settlement: (1) the strength of the plaintiff’s case and the risk, expense, complexity, and likely duration of further litigation; (2) the risk of maintaining class action status throughout trial; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of proceedings; (5) the participation of a governmental participant; (6) the experience and views of counsel; and (7) the reaction of class members. *See Hanlon*, 150 F.3d at 1026 (“*Hanlon* factors”).

The amendments to Rule 23 direct the Court to consider a similar list of factors, including whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. FED. R. CIV. P. 23(e)(2). The Advisory Committee’s notes clarify that this list of factors does not

“displace” the *Hanlon* factors, “but instead aim to focus the court and attorneys on ‘the core concerns of procedure and substance that should guide the decision whether to approve the proposal.’” *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-04883, 2019 WL 3290770, at *6 (N.D. Cal. July 22, 2019) (quoting FED. R. CIV. P. 23(e)(2) advisory committee’s note to 2018 amendment).

Additionally, for class action settlements prior to contested certification, the Ninth Circuit further requires that the Court scrutinize the settlement even more closely, applying the so-called *Bluetooth* factors.² See *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). As set forth below, the Settlement satisfies all of these factors, meriting final approval.

1. The Settlement Was Negotiated at Arm’s Length by Experienced Counsel.

The Settlement is the result of the Parties’ protracted and adversarial settlement negotiations by experienced class action attorneys. Plaintiffs are represented by Capstone Law APC and Shegerian & Associates, Inc. Plaintiffs’ Counsel employ seasoned class action attorneys who regularly litigate wage and hour claims through certification and on the merits, and have considerable experience settling wage and hour class actions. (Perez Decl. ¶¶ 10-18, Ex. 1; Kenner Decl. ¶¶ 16–20, 22–24.) Defendant is represented by Sheppard, Mullin, Richter & Hampton LLP, a respected defense firm.

2. The Extent of Discovery Completed Supports Final Approval.

As set forth in greater detail above, based on their analysis of documents and class data produced by Defendant (including a sample of Class Members’ time and pay records, and Nespresso’s labor policies and procedures manuals), Plaintiffs’ Counsel were able to realistically assess the value of Plaintiffs’ claims and intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement now before the Court. (Perez Decl. ¶¶ 4-8; Kenner Decl. ¶ 12.)

By engaging in a thorough investigation and evaluation of Plaintiffs’ claims, Plaintiffs’ Counsel can opine that the Settlement, for the consideration and on the terms set forth in the Settlement Agreement, is fair, reasonable, and adequate, and is in the best interests of Class Members in light of all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation, various defenses asserted by Defendant. (Perez Decl. ¶ 9; Kenner Decl. ¶ 12.)

² *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011).

3. The Settlement Is Within the Range of Reasonableness Considering the Strength of Plaintiff’s Case and the Risk, Expense, Complexity, and Duration of Further Litigation.

As discussed in detail below, an objective evaluation of the Settlement confirms that the relief negotiated on the Class’s behalf—a \$950,000 non-reversionary total Gross Settlement Amount—is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at arm’s-length before an experienced mediator, and the settlement confers substantial benefits to Class Members. The relief offered by the Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases.

In determining whether a settlement agreement is fair, adequate, and reasonable to all concerned, the Court may consider the strength of the plaintiff’s case and the amount offered in settlement, among other factors. *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Ultimately, “the district court’s determination is nothing more than an amalgam of delicate balancing, gross approximations, and rough justice,” and there is no single “formula” to be applied; rather, the Court may presume that the parties’ counsel and the mediator arrived at a reasonable range of settlement by considering Plaintiffs’ likelihood of recovery. *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982); *Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein*, 464 F. 2d 689, 693 (2d Cir. 1972); *see also Nat’l Rural Telecomm. Coop. v. Directv, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery”).³

Defendant’s Exposure for the Class Claims	
Off-the-Clock Claim	\$550,000.00

³ *See also In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlement’s fairness”); *In re IKON Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims”).

Defendant's Exposure for the Class Claims	
Meal Period Claim	\$336,000.00
Rest Period Claim	\$3,170,000.00
Regular Rate Claim	\$50,000.00
Business Expense Claim	\$225,000.00
Wage Statement Claim	\$1,112,000.00
Final Pay Claim	\$1,161,800.00
Total	\$6,604,800.00

These estimates assume that each and every one of Plaintiffs' claims would have been certified for class-wide resolution, that Plaintiffs would have prevailed at trial, and that the jury's verdict would have been affirmed on appeal. Understandably, for purposes of evaluating the settlement's reasonable, this estimate must be "tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *In re Toys R Us-Delaware, Inc.-- Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014).

Ultimately, Plaintiffs' Counsel determined an appropriate range of recovery for settlement purposes by offsetting Defendants' maximum theoretical liability by: (i) the strength of the defenses to the merits of Plaintiffs' claims; (ii) the risk of class certification being denied; (iii) the risk of losing on any of a number of dispositive motions that could have been brought between certification and trial (e.g., motions to decertify the class, motions for summary judgment, and/or motions in limine) that might have eliminated all or some of Plaintiffs' claims, or barred evidence/testimony in support of the claims; (iv) the risk of losing at trial; (v) the chances of a favorable verdict being reversed on appeal; and (vi) the difficulties attendant to collecting on a judgment (collectively, the "Discount Factors").

After taking into account the Discount Factors, Plaintiffs' Counsel determined that it would be reasonable to settle for a fraction of Defendants' maximum potential exposure for the class claims (PAGA discussed in the following section), or approximately 15 percent. Such a discount is inherently reasonable given that Plaintiffs would have had to overcome **multiple, dependent** contingencies to prevail on his claims. If anything, the projected odds for each of the above contingencies is generous to the class's position, since plaintiffs in employment cases rarely prevail on **all of the claims** at any of these dispositive stages.

Courts routinely approve settlements that provide a similar discounted range of the maximum

potential recovery. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256-58 (D. Del. 2002) (recognizing that a reasonable settlement amount can be 1.6% to 14% of the total estimated damages); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (settlements with a value of 1% to 8% of the estimated total damages were approved); *In re Four Seasons Secs. Laws Litig.*, 58 F.R.D. 19, 37 (W.D. Okla. 1972) (approving 8% of damages); *Balderas v. Massage Envy Franchising, LLP*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (finding that settlement which amounted to 8% of maximum recovery “[fell] within the range of possible initial approval based on the strength of plaintiff’s case and the risk and expense of continued litigation.”); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement of 6% to 8% of estimated damages).⁴

4. The Settlement Class Has Responded Positively to the Settlement.

In evaluating the fairness of a Settlement, the “absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *National Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004). Here, no Class Members have opted out or objected to the Settlement. (Garcia Decl. ¶¶ 6-7.) The Class’s response is “overwhelmingly positive,” supporting approval of the Settlement. *See 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1152-53 (finding support for the settlement where 80 out of 5,454 class members elected to opt out and nine class members objected); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (finding 0 objections and

⁴ *See also In re Uber FCRA Litig.*, No. 14-cv-05200-EMC, 2017 U.S. Dist. LEXIS 101552, at *23- 24 (N.D. Cal. June 29, 2017) (granting preliminary approval to class action settlement where gross settlement fund, prior to deducting attorneys’ fees and services awards, was valued at 7.5% or less of total possible verdict); *Viceral v. Mistras Grp., Inc.*, No. 15-cv-02198-EMC, 2016 U.S. Dist. LEXIS 140759, at *21 (N.D. Cal. Oct. 11, 2016) (granting preliminary approval to class action settlement representing “8.1% of the full verdict value” with net settlement amount representing approximately 5.3% of full verdict value); *Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval to settlement with net recovery to Plaintiffs valued at 7.3% of potential maximum recovery); *Cruz v. Sky Chefs, Inc.*, No. 12-cv-02705-DMR, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) (granting final approval where gross settlement amount represented 8.6% of the maximum potential recovery from the class claims and estimated amount distributable to class after accounting for attorneys’ fees and other deductions represented approximately 6.1% of maximum potential recovery); *In re LDK Solar Sec. Litig.*, No. 07-cv-05182-WHA, 2010 WL 3001384, at *2 (N.D. Cal. July 29, 2010) (granting final approving where “[t]he proposed settlement amount is [. . .] only about five percent of the estimated damages before fee and costs—even before any reduction thereof for attorney’s fees and costs.”).

16 opt-outs out of 329 class members [4.86%] “strongly support[] settlement”); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW EMC, 2010 WL 1687832, at *15 (N.D. Cal. Apr. 22, 2010) (finding an opt-out rate of 0.4% supported settlement). In other words, “[t]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

The average settlement payment from the Net Settlement Fund is \$837.67 and the highest is \$3,257.40. (Garcia Decl. ¶ 9.) This average net recovery is significantly greater than many other wage and hour class action settlements approved by California state and federal courts. *See, e.g., Sandoval v. Nissho of Cal., Inc.*, Case No. 37-2009-00091861 (San Diego County Super. Ct.) (average net recovery of approximately \$145); *Fukuchi v. Pizza Hut*, Case No. BC302589 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Contreras v. United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of approximately \$90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal.) (average net recovery of approximately \$65); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal.) (average net recovery of approximately \$60); *Lim v. Victoria’s Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately \$35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct.) (average net recovery of approximately \$20); *Jones v. Bath & Body Works, Inc.*, No. 2:13-cv-05206-FMO-AJW (C.D. Cal.) (average net recovery of approximately \$50); and *Palencia v. 99 Cents Only Stores*, No. 34-2010-00079619 (Sacramento County Super. Ct.) (average net recovery of approximately \$80).

C. The Court Should Approve the PAGA Settlement.

Pursuant to the Settlement Agreement, \$80,000 from the Gross Settlement Amount shall be allocated to the resolution of the PAGA claim, of which 75% (\$60,000) will be paid directly to the LWDA, and the remaining 25% (\$20,000) will be paid to Participating Class Members. (Settlement Agreement ¶ 39.)

This result was reached after good-faith negotiation between the parties. The amount was valued as follows: Based on information and evidence produced by Defendant during discovery, Plaintiffs

determined that aggrieved employees worked a combined total of approximately 20,000 pay periods during the PAGA statute of limitations period (“PAGA Period”). Unless otherwise provided by the Labor Code,⁵ PAGA civil penalties for Labor Code violations are calculated according to Labor Code 2699(f)(2): If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation (the “subsequent violation penalty”).

However, a number of courts have found that the “subsequent” penalty under PAGA applies only after a court or the Labor Commissioner determines that the employer has violated the Labor Code. *See Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 356 (2021) (“the increased \$200 civil penalty for ‘subsequent violation[s]’ does not apply unless [Plaintiff] presents evidence that the Labor Commission or a court notified [Defendant] that it was in violation of the Labor Code.”); *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1173 (9th Cir. 2021) (reversing judgment as to “heightened civil penalties” because the defendant was not given notice by the Labor Commissioner when the “subsequent” violations occurred).⁶ Under this line of cases, Defendant’s exposure would be approximately \$2 million = 20,000 violative pay periods × \$100.

It should be noted that PAGA gives the Court wide latitude to reduce the amount of civil

⁵ For example, Labor Code section 558 authorizes the Labor Commissioner to seek civil penalties for overtime and other workday violations at an initial violation rate of \$50 for each underpaid employee for each pay period and a subsequent violation rate of \$100 for each underpaid employee for each pay period. *See* Lab. Code § 558; *see also* *ZB, N.A. v. Super. Ct.*, 8 Cal. 5th 175, 197 (2019) (calculating PAGA penalties for overtime violations according to the Section 558 penalty rates); *Lawson v. ZB, N.A.*, 18 Cal. App. 5th 705, 724 (2017), as modified (Dec. 21, 2017), *aff’d* but criticized sub nom. *ZB, N.A. v. Super. Ct.*, 8 Cal. 5th 175 (2019) (“we note that with respect to the meal break and rest break violations . . . section 558 provides either a \$50 or \$100 assessment for each violation during a pay period”).

⁶ *See also* *Vieyara-Flores v. Sika Corp.*, No. EDCV19606JVSCKX, 2019 WL 2436998, at *5 (C.D. Cal. June 10, 2019) (“employers are not subject to heightened penalties . . . until a court or commissioner notifies the employer that it is in violation of the Labor Code . . . [Plaintiff] has not offered evidence that the Labor Commission or a court has notified them of PAGA violations [thus] PAGA’s heightened penalty of \$200 for subsequent violations will not be calculated to determine the amount in controversy”); *Chen v. Morgan Stanley Smith Barney, LLC*, No. 8:14-CV-01077 ODW (FFMx), 2014 WL 4961182 (C.D. Cal., October 2, 2014) (“Under the Labor Code, if an employer does not have notice that they are committing a violation, they are not subject to the heightened penalties.”); *Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”), citing *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008).

penalties “based on the facts and circumstances of a particular case” when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(h). In reducing PAGA penalties, courts have considered issues including whether the employees suffered actual injury from the violations, whether the defendant was aware of the violations, and the employer’s willingness to fix the violation. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of only 0.2% of the maximum); *see also Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016); *Fleming v. Covidien Inc.*, No. ED CV 10-01487 RGK (OPX), 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

For example, during the penalty phase of trial in *Carrington*, the plaintiff requested PAGA penalties in the amount of approximately \$70 million. The trial court instead awarded only \$150,000—**or 0.21% of the maximum**—and stated that this reduction was warranted because imposing the maximum penalty would be “unjust, arbitrary, and oppressive” based on Starbucks’s “good faith attempts” to comply with meal period obligations and because the court found the violations were minimal. *Carrington*, 30 Cal. App. 5th at 517. The Court of Appeal affirmed the lower court’s reduced award of a \$150,000 penalty under PAGA. *Id.* at 529.

Likewise, in *Covidien*, the Court reduced the potential penalties by over 82%, awarding \$500,000 instead of maximum penalties of \$2.8 million. *Covidien*, 2011 WL 7563047 at *4; *see also Thurman v. Bayshore Transit Mgmt.*, 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming 30% reduction under specified PAGA claim where the employer produced evidence that it took its obligations seriously); *Elder v. Schwan Food Co.*, No. B223911, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May 12, 2011) (reversing trial court decision denying any civil penalties where violations had been proven, remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17 (N.D. Cal. June 15, 2012) (denying PAGA penalties for violation of California Labor Code section 226 as redundant with recovery on a class basis pursuant to California Labor Code section 226, directly); *Aguirre v. Genesis Logistics*, No. SACV 12-00687 JVS (ANx), 2013 WL 10936035 at *2-*3 (C.D. Cal. Dec. 30, 2013) (reducing penalty for past PAGA violations from \$1.8 million to \$500,000, after rejecting numerous other PAGA claims).

Plaintiffs therefore determined an appropriate range of settlement for PAGA penalties as a percentage of the settlement range that was consistent with other hybrid class/PAGA settlements approved by California courts.⁷ Where PAGA penalties are negotiated in good faith and “there is no indication that [the] amount was the result of self-interest at the expense of other Class Members,” such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see, e.g., Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 579 (2010) (“[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.”).

D. The Requested Payment to the Settlement Administrator Is Reasonable and Should Receive Final Approval.

Plaintiffs request final approval of settlement administration costs in the amount of \$10,000. (Garcia Decl. ¶ 10.) CPT has promptly and properly distributed the Class Notice to all Class Members and completed its duties in accordance with the settlement terms and the Court’s preliminary approval Order. (*See generally* Garcia Decl.) Accordingly, the \$10,000 payment is fair and reasonable and should be accorded final approval along with the rest of the Settlement terms.

IV. CONCLUSION

The Parties have negotiated a fair Settlement of the wage and hour claims that likely would not

⁷ *Dearaujo v. Regis Corp.*, No. 2:14-cv-01408-KJM-AC, 2016 WL 3549473 at *3 (E.D. Cal. June 29, 2016) (preliminarily approving \$1.95 million settlement containing \$10,000 PAGA penalties with \$7,500 paid to LWDA); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575 at *7 (E.D. Cal. Oct. 31, 2012) (approving \$3.7 million settlement containing \$10,000 PAGA penalties with \$7,500 paid to LWDA); *Chu v. Wells Fargo Invst., LLC*, No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (approving \$6.9 million settlement containing \$10,000 PAGA penalties with \$7,500 paid to LWDA); *Guerrero v. R.R. Donnelley & Sons Co.*, Case No. RIC 10005196 (Riverside County Super. Ct. July 16, 2013; Judge Matthew C. Perantoni) (gross settlement fund of \$1,100,000, of which \$3,000 (or 0.3%) was allocated to the settlement of PAGA penalties); *Parra v. Aero Port Services, Inc.*, No. BC483451 (L.A. County Super. Ct. April 20, 2015; Judge Jane Johnson) (gross settlement fund of approximately \$1,458,900, of which \$5,000 (or 0.3%) was allocated to the settlement of PAGA penalties); *Thompson v. Smart & Final, Inc.*, No. BC497198 (L.A. County Super. Ct. Nov. 18, 2014; Judge William F. Highberger) (gross settlement fund of \$3,095,000, of which approximately \$13,333 (or 0.4%) was allocated to the settlement of PAGA penalties); *Chavez v. Vallarta Food Enterprises, Inc.*, No. BC490630 (L.A. County Super. Ct. Nov. 10, 2014; Judge William F. Highberger) (gross settlement fund of \$1,545,900, of which \$10,000 (or 0.6%) was allocated to the settlement of PAGA penalties); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013; Judge Kenneth R. Freeman) (gross settlement fund of \$1,535,000, of which \$1,000 (or 0.1%) was allocated to the settlement of PAGA penalties).

1 have been brought, let alone successfully resolved, but for the effort and resolve of the Plaintiffs and their
2 counsel. The Class Members' positive response indicates that the Settlement is fair and reasonable.
3 Accordingly, Plaintiffs respectfully request that this Court grant final approval of the Settlement
4 Agreement and enter judgment.
5

6 Dated: April 4, 2023

Respectfully submitted,

7 By: /s/ Raul Perez

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